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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-266

JOHN J. TATAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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I. Petitioner Was Entrapped as a Matter of Law

Contrary to the Government's contention (Opposition, pp. 1-2), the opinion below *does not* set forth the "relevant facts" and there *was not* "ample evidence" from which the jury could find the absence of entrapment. Because the Court of Appeals merely referred to a handful of selected questions and answers, the Petition filed herein (pp. 9-12) attempted to set

forth in some detail what the evidence as a whole reflected, illustrating that as a matter of law petitioner was entrapped. The full scope of relevant evidence cannot be gleaned solely from a reading of the Court of Appeals opinion, an opinion reflecting obeisance to a jury verdict so long as a scintilla of supportive evidence could arguably be found in the record. The Court of Appeals claimed to find an uncorroborated and ambiguous *inference* in the record that petitioner was predisposed to offer a bribe a week before it was offered, and with that placed its imprimatur on the verdict. The Court of Appeals opinion failed utterly to examine whether as a matter of law entrapment was shown based on the record as a whole, and the Government's reliance upon the opinion below as self-supporting, without analysis or discussion, does not controvert petitioner's well documented contention that he was entrapped in a most calculated manner by an internal revenue agent, at the behest and with the assistance of his supervisors. Moreover, the findings and conclusions of the Court of Appeals opinion supporting the jury verdict are pointless because they are premised upon an incorrect standard of entrapment, and because of incorrect assumptions that the jury was properly instructed on entrapment (it was not), that the jury understood the instructions (it did not), and that the jury was not coerced (it was). The rationalizations of the Court of Appeals are even more pointless because the proper legal determination which was required included the question of whether the entrapment issue should have been submitted to the jury at all.

Regardless of whether the proper standard in entrapment cases should focus upon an accused's pre-

disposition or upon the Government's conduct, and regardless of whether or how this Court might decide the other questions presented [independent judicial determination of the entrapment issue, and whether the jury was improperly coerced after becoming deadlocked at the end of a second trial], this Court should find entrapment as a matter of law and reverse this conviction as it did in *Sherman* v. *United States,* 356 U.S. 369 (1958). See Opposition, p. 2 (fn. 1).

II. Improper Jury Instructions, Improper Entrapment Standard

The Government's Opposition does not address the substantial question raised in the Petition for Certiorari, whether the use of the "predisposition" test constitutes an abandonment of the law enunciated by this Court in *Sorrells* v. *United States,* 287 U.S. 435 (1932), and in *Sherman, supra.* While the Government seems to acknowledge that an inquiry into the "creative activity of [law enforcement] officials" is the correct approach in resolving entrapment issues (Opposition, p. 2; quoting from *Sorrells*), the Government fails to recognize or admit that the lower courts herein erroneously abandoned that test in favor of an inquiry into whether petitioner had a "predisposition" to offer a bribe. As a result this Court has been left without an expression of the Government's views on the question raised in the Petition (Question 1) as to which standard is the proper one, and without an expression of the Government's views on the fundamental constitutional problems caused by use of the "predisposition" test.

For example, the "predisposition" test requires the jury to engage in a speculative, subjective, mind-reading inquiry into an accused's "predisposition" to

commit the crime charged without hearing testimony from the accused and observing his demeanor while testifying. In order to counter the catastrophic risk presented, the accused is forced to take the witness stand to dispute the Government's evidence, such as the flimsy inference interjected into this case by the revenue agent's uncorroborated testimony concerning an unrecorded and ambiguous statement by petitioner a week before the alleged bribe offer took place. The compulsion upon petitioner to testify in order to clarify or negate such an inference is directly contrary to an accused's absolute constitutional right not to testify at his trial. A clearer and more direct compulsion upon an accused to testify at his trial in order to overcome the erroneous application of the "predisposition" test cannot be imagined. Because petitioner opted not to testify at his trial, this alleged inference went unassailed, and it was then argued repeatedly to the jury by the prosecutor, his only real argument on predisposition (Tr. 137-139, 142-143, 144, 147, 180, 185-186, 187); it provided an evidentiary predicate for the trial court's erroneous "predisposition" entrapment instruction which was given *three* times after closing arguments; and it provided the Court of Appeals with what it erroneously termed "substantial evidence" supporting the jury verdict.

Only by the application of a test which focuses attention on the objective facts of the creative activity of the Government's agents, the test which we submit is required and which has been mandated by this Court in its 1932 and 1958 opinions dealing with entrapment (*Sorrells* and *Sherman*), can an accused's absolute right not to give testimony at his trial be protected. The Government's failure to dispute the contention that

the wrong standard was used, and the Government's failure to come to grips with the practical and constitutional problems resulting from the use of the wrong standard, requires the conclusion that the Government cannot support the standard which was used here and which is used in the majority of entrapment issues. We submit that the question of which is the appropriate standard in entrapment cases is compelling, that it has constitutional dimensions, that it is determinative in this case, that the use of the incorrect "predisposition" test is a perversion of the real inquiry in entrapment cases (Did the Government go too far?), and that the ends of justice require a plenary consideration of this issue by this Court with the benefit of briefs and argument by petitioner and by the Government.

III. Court Determination of Entrapment Issues as a Matter of Law Under a Procedure Analogous to the Jackson v. Denno Confession Procedure

The Government contends that the petitioner has offered no "persuasive reasons for reexamination" of this Court's unwillingness in 1958 to require a procedure in entrapment cases which was then sought but not adopted until 1964, and then in confession cases. *Jackson* v. *Denno,* 378 U.S. 368 (1964). Without analysis the Government contends that the *Jackson* rule is inappropriate in entrapment cases because of the "different problem of the grave danger of jury prejudice unless the court makes a preliminary finding regarding the voluntariness of a confession." The Government's Opposition does not say it, but the argumentative implication is there—that there is little or no jury prejudice in entrapment cases. This is seriously incorrect. Jury prejudice is even greater in entrapment cases than in confession cases. The typical

entrapment case, such as the instant case, is characterized by an *admission* that the crime was committed and that the accused committed it, compounded by the inherent compulsion upon an accused to testify to dispute inferences of predisposition. What could be more prejudicial? At least in confession cases, where voluntariness is an issue for the jury, the very admission contained in the confession is being contested by the defense, and the inquiry focuses at least in part upon the objective facts of police conduct.

The Government's contention that the decisions in *Sherman, supra,* and *Masciale* v. *United States,* 356 U.S. 386 (1958), "fully considered and rejected" a procedure analogous to that subsequently adopted in *Jackson* is also incorrect. In *Sherman* the conviction was reversed because entrapment was shown as a matter of law, and in reversing that conviction the Court *did not have to reach* the question of whether such a judicial hearing procedure should be required in entrapment cases. *Masciale* is the only case in which a majority of the Court (five justices) actually considered and rejected the suggestion of an independent hearing by the trial court, without a jury, on the question of entrapment; however, in *Masciale* this Court's rejection of this suggestion was not on the merits of the issue itself, but because the Court deemed the question not ripe for decision. Moreover, as in *Sherman,* the question of entrapment as a matter of law was easily decided in *Masciale* where there was not even a "close question" which may have made a more compelling argument for a separate determination by the trial court without a jury.

The only other decision rendered by this Court involving entrapment since 1958 is the 1963 opinion in

Lopez v. *United States,* 373 U.S. 427. *Lopez,* like the instant case, involved bribery of a revenue agent with a tape recording of the conversation. However, in *Lopez* this Court specifically found that the petitioner therein was not contending for a judicial hearing procedure such as was contended for in *Sherman* and *Masciale,* and the Court therefore concluded that "we are not now presented with that question." [373 U.S. 427, 436 (fn. 7)]. *Lopez* was essentially a surveillance case, not an entrapment case. Moreover, contrary to the Government's assertion (Opposition, p. 2), we are not contending that entrapment issues should never be submitted to the jury. We are contending, just as in confession cases, that the trial court should first determine the entrapment issue from the point of view of restraining improper Governmental inducements to crime, with jury consideration thereafter only if the Court does not find entrapment as a matter of law.

Accordingly, the statement in the Government's Opposition is misleading, that this Court has "fully considered and rejected" the proposition that entrapment issues should first be decided by the trial court without a jury, employing a proper standard. That question was not reached in *Sherman* because it was unnecessary to do so; the question was not reached in *Masciale* because the Court felt that the issue was not ripe for decision; and the question was not reached in *Lopez* because the petitioner did not present the issue. And beyond these considerations, this Court could not have *fully* considered and rejected this procedure in 1958 as the Government erroneously contends, because six more years were yet to elapse before this identical proposal was adopted by this Court in any

context (*i.e.*, 1964), and then in the analogous context of determining the voluntariness of confessions. Because of the limiting circumstances prevailing when this issue was first presented to the Court in 1958, when the concept was entirely novel, and because this Court has not since addressed this question in the context of entrapment cases as it did in confession cases in 1964 (*Jackson* v. *Denno*), we submit that a critical oversight affecting substantial justice has developed, an oversight which can now be remedied by full consideration of this question in the context of this case where the application of a proper procedure under a proper test would be determinative. This Court now has the opportunity in light of substantial experience under *Jackson* v. *Denno* to require a proper procedure to be used in entrapment cases; to require a proper standard focusing on the Government's objective conduct rather than on an accused's subjective state of mind; to vindicate a defendant's Fifth Amendment right not to be forced to testify at trial; and to begin the process of accumulating explicit standards and legal precedents by trial and appellate courts as to what constitutes impermissible Government conduct in obtaining convictions, as called for by Justices Frankfurter, Harlan, Douglas and Brennan in their concurrence in *Sherman* and dissent in *Masciale*.

IV. The Trial Court's Coercion of the Jury Was Reversible Error

The Government incorrectly states that the trial court's "Allen" charge was "not at all comparable" to that in *Jenkins* v. *United States*, 380 U.S. 445 (1965), and the Government is also incorrect in its statement that the trial judge in this case "did not indicate that the jury had to reach a decision" (the deter-

minative coercive element in this Court's *per curiam* reversal of the conviction in *Jenkins*).

Consider the comments by the trial court in this case, comments which go beyond the traditional "Allen" charge: "This is the second time this case has been tried. There was a trial a month ago and the jury was hung up. And this is the second time;" and "You should consider that the case at some time must be decided, sometime it has to be decided." The instruction given in this case is virtually identical to the instruction given in the *Jenkins* case, with different wording perhaps, but just as coercive. In *Jenkins* the trial court stated: "You have got to reach a decision in this case." The Government's failure to provide any analysis of how the instruction given in this case was in effect less coercive and therefore less reversible than the instruction given in the *Jenkins* case belies the Government's argument that there is no comparison between the two cases. The comparison is obvious. The Petition filed herein cites several decisions by various courts of appeals in recent years which illustrate the reversible nature of the trial court's admonitions in this case (Petition, p. 17, fn. 7). See especially *United States* v. *Harris,* 391 F. 2d 348, 355 (6th Cir., 1968), where the first trial resulted in a hung jury and mistrial, and at the second trial the court stated: "This lawsuit must be decided—it must be decided at some time by some jury." In such circumstances these comments were held to be reversible error—exactly the same circumstances and comments as in the instant case.

This Court need not reach and review the general application of the "Allen" charge in order to find that the trial court in this case coercively "Allenized"

the jury, requiring a reversal of the conviction. Nevertheless, the whole question of continued use of the traditional "Allen" charge (even without extra comment) should be clarified by this Court. The Government's candid admission of the existence and degree of conflict within the Circuits over this question underlines the compelling need for a definitive resolution. This Court should consider using this case as a vehicle to exercise its general supervisory power over such a wide-ranging and pervasive question of administration of justice in this country. With the increased frequency of appellate court reversals of jury verdicts rendered after coercive Allen charges, usually involving added, extracoercive language as in this case, and with at least three of the eleven Circuits having already exercised supervisory power to stop the use of the traditional Allen charge, the question of a uniform, national policy in the federal courts cannot be and should not be avoided any longer. In 1963 Mr. Justice Clark expressed his view that the "Allen" case was dead law in the following language:

> "Nor do we circulate the "Allen charge" to the new judges as I used to do when heading up the Criminal Division of the Department of Justice. Allen is dead and we do not believe in dead law." *Progress of Project Effective Justice —A Report To The Joint Committee*, 47 J. Am. Jud. Soc'y. 88, 90 (1963).

It is time for this Court to give Allen's ghost perpetual rest.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should be granted.

Respectfully submitted,

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